BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES C. HENRY	)	
Claimant	)	
	)	
VS.	)	
	)	
MID KANSAS SEAMLESS	)	
Respondent	)	Docket No. **1,048,734**
	)	
AND	)	
	)	
TRAVELERS INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the May 3, 2010 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

On December 14, 2009, claimant fell from a ladder while installing guttering. The Administrative Law Judge (ALJ) rejected respondent's argument that claimant was barred from receiving workers compensation benefits as his marijuana use or consumption had impaired claimant and contributed to his accident. The ALJ reasoned, in part:

> There is no evidence in the record to suggest that any impairment the Claimant might have had contributed to his work related accident. His testimony is uncontradicted and the testimony of his foreman and co-workers do not support a finding that an impairment contributed to the Claimant's job related accident.[1]

It is not clear from the Order whether the ALJ admitted into the record the results from a urine sample allegedly taken from claimant.

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[1] ALJ Order (May 3, 2010) at 2.

Respondent and its insurance carrier argue the ALJ erred in not finding claimant's use or consumption of marijuana contributed to his work-related injury. They maintain that a urine sample taken from claimant establishes he had a marijuana metabolite level of more than 14 times the level needed to establish a conclusive presumption of impairment under K.S.A. 44-501(d)(2) and there is no other reason to explain why he fell from the ladder. Accordingly, respondent and its insurance carrier contend the Board should deny claimant's request for benefits.

Claimant argues the Order should be affirmed. He maintains the chemical test results offered into evidence does not satisfy the requirements set forth in the Workers Compensation Act (Act) and, therefore, the test results are inadmissible. Claimant maintains respondent and its insurance carrier (1) *failed to prove* the initial testing was done in the normal course of medical treatment for reasons related to his health and welfare as the doctor that respondent utilized to establish this element did not know why the trauma team did what they did, whether the trauma team took the initial urine sample, or why the first sample was taken; (2) *failed to prove* the collecting and labeling of the second urine sample was performed by or under the supervision of a licensed health care professional as it was allegedly taken under the supervision of a phlebotomist, who is certified but not licensed; (3) *failed to prove* the testing of the urine samples was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment as the testimony allegedly established the laboratory was merely *certified* rather than licensed; and (4) *failed to prove* beyond a reasonable doubt the test results were from samples taken from him because the chains of custody of the samples allegedly are incomplete.

Finally, claimant argues the evidence fails to establish that his alleged impairment contributed to his injury as respondent's medical expert Dr. John McMaster, who respondent offered to prove that required element, had no knowledge of the details surrounding the accident and the doctor expressed his opinion merely in terms of possibility rather than probability.

The issue before the Board on this appeal is whether respondent has established that claimant's injury was contributed to by his use or consumption of marijuana.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record compiled to date, the undersigned Board Member finds and concludes:

Claimant worked for respondent as a gutter installer. On Monday, December 14, 2009, claimant fell from a ladder while installing guttering on a bank. Claimant testified he was hanging a 30-foot piece of guttering when his ladder 'walked' and then fell. He described the accident, as follows:

> Well, we got out and we measured the job, got our ladders out, and the crew chief proceeded to run the gutter out, started hanging pieces, and we came around to a 30-foot piece that was – that I was going to hang, and I proceeded to climb up my ladder, and the ladder started to walk a little bit. Then next thing I know, the ladder fell and I was on the ground.[2]

Claimant believes his head was 15 or 16 feet above the concrete surface below when he fell and landed on his head and wrist. He testified the ladder had walked on him before but he did not fall.[3] And he believes he may have fallen on only one other occasion during his four year tenure with the company.[4]

Immediately after the accident, Mr. Yoder drove claimant to the emergency room of a Hutchinson hospital. Claimant was given a cervical collar and then flown by helicopter to Wichita, Kansas, where he underwent a left craniotomy to evacuate an epidural hematoma. When he testified at the February 2010 preliminary hearing, claimant was continuing to receive medical treatment and therapy for the injuries sustained in his accident.

The morning of the accident claimant's foreman, Nelson Yoder, drove claimant and a coworker, Keith Keim, from Hutchinson, Kansas, to the job site in Andale, Kansas, in a company truck. Mr. Yoder testified that he and claimant met at the company shop that morning at about 6 a.m. and they loaded the materials they needed into the truck and trailer. On their way to Andale they stopped and picked up Mr. Keim. Claimant sat in the passenger seat during the trip and Mr. Keim sat in the backseat of the crew cab pickup. Both Mr. Yoder and claimant estimate they arrived at the bank at about 7:30 a.m. After unloading their equipment and materials, they measured the building, and Mr. Yoder began forming the guttering with a seamless guttering machine in the trailer, while claimant and Mr. Keim began installing it.

The claimant remembers the day being frigid and windy, but at the preliminary hearing he did not testify that either of those factors played any particular role in his accident. Claimant estimates the accident occurred at approximately 8:30 a.m. after he had been up and down the ladder for about 20 to 30 minutes. Neither Mr. Yoder nor Mr. Keim noticed anything unusual about claimant in the hours before the accident. Claimant neither acted strange nor smelled of marijuana.

Mr. Yoder agreed with claimant that it was windy the day of the accident. But he did not agree that they had experienced any problems with their ladders 'walking'. And Mr.

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[2] P.H. Trans. at 10.

[3] *Ibid.* at 11.

[4] *Ibid.* at 17.

Keim, who is also represented in a workers compensation claim by the office of claimant's attorney, testified the ladders they used on the job did not usually move when placed on a solid surface.

One of respondent's co-owners, Todd Wilson, testified that he had heard of the ladders 'walking' but they are not going to walk "if you have them placed out and tight, . . ."[5] Moreover, Mr. Wilson testified that he had never seen claimant 'smoking dope' but he had suspected it.

> Q. (Mr. Rice) Okay. Had you ever had any problems with Mr. Henry and drugs prior to this?
>
> A. (Mr. Wilson) Never saw him smoking dope but I always suspected it.
>
> Q. Okay. And how is that?
>
> A. I asked him to come back into the office one day after he got off work. He came in about an hour later. Eyes were all bloodshot. Alan and I had a meeting with him. He sat in the chair, asked him a question. I mean all the signs of being high. And then when I'd ask him a question, he'd just take his time and then he'd answer it. I asked him, are you high, and he said no. I said, boy, your eyes are sure bloodshot. I said, I know a lot of people that have gotten high before and you look like it. And he said, I have a friend that's in the hospital. I've been pretty emotional since I got home. I said, okay, James. If that's your story, stick to it.[6]

The record does not reveal when this conversation occurred.

Respondent presented the testimony of Dr. John McMaster, who practices emergency medicine in Wichita. Dr. McMaster testified a drug screen was initially performed by the trauma team at Via Christi St. Francis Medical Center to determine if there were any drugs that may have been affecting claimant's mental status and neurologic status.[7] After the initial drug screen, Dr. McMaster was contacted by an attorney representing respondent about verifying and quantifying the psychoactive component of marijuana in claimant's urine. Consequently, at about 5 p.m. on December 15, 2009, the doctor ordered another urine sample and the quantitative drug screen, which was carried out at Affiliated Medical Laboratory, Inc. (AMS Labs).

Considering the results from the second urine sample, Dr. McMaster concluded on the day of the accident and immediately before hospitalization at Via Christi St. Francis

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[5] Wilson Depo. at 25.

[6] *Ibid.* at 22.

[7] McMaster Depo. at 8.

Medical Center (Via Christi) claimant was under the influence of marijuana.[8] Moreover, the doctor testified it was very possible marijuana contributed to claimant's accident. The doctor testified, in part:

> Q. (Ms. Penner) Was the presence of this drug in Mr. Henry's system contributory to an occupational injury, and furthermore was the – well, let me stop there. Was it contributory to an occupational injury?
>
> MR. RICE: Object to the form of the question.
>
> A. (Dr. McMaster) Very possibly, given the particular situation and occupational injury or incident, which I have no knowledge of.
>
> . . .
>
> Q. Understanding that his occupational tasks involved climbing a ladder, being able to balance himself, carrying guttering, would the presence of the marijuana in his system – could it have contributed to that occupational injury?
>
> MR. RICE: Object to the form of the question.
>
> Q. Him falling off a ladder?
>
> A. Very significantly, yes.[9]

In his March 23, 2010, report the doctor was more certain of his opinion. The doctor wrote, in part:

> Based upon a reasonable degree of medical certainty, utilizing my training, education, research and experience, the presence of this substance within Mr. Henrys' central nervous system was significantly contributory to this occupational occurrence and due to recent as opposed to remote use as evidenced by the calculated creatinine-normalized ratio of the two separate urine specimens provided.[10]

In summary, Dr. McMaster indicated both drug screens showed a marijuana metabolite, THC, of more than the 15 nanograms per milliliter, which creates a conclusive presumption of impairment under the Workers Compensation Act.[11]

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[8] *Ibid.* at 14.

[9] *Ibid.* at 17-18.

[10] *Ibid.*, Ex. 1 at 3.

[11] See K.S.A. 2009 Supp. 44-501(d)(2).

There is no dispute the first urine sample from claimant was processed without any type of form documenting the chain of custody. The second sample, which was obtained the afternoon following claimant's accident, was taken without the claimant's consent at Dr. McMaster's direction after the doctor was requested to do so by an attorney representing respondent and its insurance carrier. That second sample was obtained for forensic rather than medical purposes.[12] But unlike the first sample, the second urine sample was accompanied by a form that documented the sample's chain of custody, although the form was somewhat incomplete.

The second urine sample was forwarded to AMS Labs, which Dr. McMaster testified was a subsidiary of Via Christi and of which the doctor knew very little.[13] In the doctor's March 23, 2010, report to respondent's attorney, Dr. McMaster wrote that AMS Labs was "a Kansas and DHHS certified laboratory."[14] At AMS Labs the second sample was initially screened and then tested by chromatography-mass spectroscopy (GC/MS).

The chain of custody of the second sample fails to show who accepted the sample in the Via Christi lab as it awaited transport to AMS Labs. Likewise, it fails to show who transported the sample to AMS Labs and who accepted it. The GC/MS results from AMS Labs indicated the Carboxy-THC level in claimant's second urine sample was 212 nanograms per milliliter. The report also read, in part:

> The Substance Abuse and Mental Health Services Administration, Division of Workplace Programs, has established the cutoff for Carboxy-THC at 15 ng/ml. Results below this cutoff are considered "Not Detected" for workplace related testing or for revoking parole.[15]

Claimant's attorney objected to the results of the urine sample on the basis that the sample and results and did not comply with the prerequisites of K.S.A. 44-501.

When claimant's attorney asked Dr. McMaster, in essence, the level of marijuana that would be deemed insignificant as a contributing factor to claimant's accident, the doctor testified there was little research on the subject.

> Q. (Mr. Rice) Okay. Fair enough. At what level – you have given the opinion that the effects of the drug contributed to his injury. At what level would it not contribute? Can you give me a cutoff? I know you've talked about 15. In your medical opinion where is the cutoff?

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[12] *Ibid.* at 27.

[13] *Ibid.* at p. 36.

[14] *Ibid.*, Ex. 1 at 1.

[15] Cox Depo., Ex. 2 at 2.

> A. (Dr. McMaster) The federal authorities have in their infinite wisdom years ago established that 15 was a valid number to utilize for identification of significant impairment. Interestingly, little research is able to be done in this area for a variety of reasons. Maybe the claimant's bar would like to fund some research. I've got some great ideas. But, nonetheless, the level of 15 has been mandated by the federal government as the level at which an individual has had significant exposure to marijuana to such degree so as to impair their abilities for performing physical, cognitive, and highly specialized tasks. Does that answer your question?[16]

As indicated above, the preliminary hearing Order does not indicate whether the ALJ considered the results of claimant's second urine sample. Without that evidence, there was no foundation for Dr. McMaster's opinions.

The Workers Compensation Act generally bars the payment of compensation when a worker's injury was contributed to by the use of drugs. The Act provides, in part:

> The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants, or hallucinogens. . . . It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed . . . [17]

And the chart lists the level for marijuana metabolite at 15 nanograms per milliliter.

Moreover, the same statute states that the results of a chemical test shall not be admissible evidence to prove impairment unless the following requirements are met:

> (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
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> (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
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> (C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

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[16] McMaster Depo. at 31-32.

[17] K.S.A. 2009 Supp. 44-501(d)(2).

> (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
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> (E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except no such confirmation is required for a blood alcohol sample; and
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> (F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.[18]

The undersigned Board Member finds the results of the second urine sample are not admissible and, therefore, those test results are not admissible. Consequently, there was no foundation for Dr. McMaster's opinions. The Act specifically requires the collecting *and* labeling of the test sample to be performed by or under the supervision of a licensed health care professional. The evidence establishes that the second test sample was collected by being drawn from claimant's catheter bag by a nurse, but the person responsible for collecting and labeling the sample was phlebotomist Christopher M. Spence. Mr. Spence is not licensed. Although Mr. Spence testified the nurse who drew the urine was licensed, there is no testimony the sample was collected or labeled under the nurse's supervision. Conversely, Mr. Spence indicated he was the person responsible for obtaining the sample and he supervised the nurse in that regard. Indeed, there is no evidence in the record that the nurse had any knowledge of the appropriate procedures for collecting and labeling samples for forensic purposes.

Claimant testified about how the ladder moved on him and both Mr. Yoder and Mr. Keim testified that claimant neither appeared impaired nor acted unusual on the morning of the accident. The ALJ was persuaded by that testimony and awarded claimant preliminary hearing benefits. The undersigned Board Member agrees. There is no question that claimant's accident arose out of and in the course of his employment with respondent. At this juncture, the record fails to establish that claimant was impaired at the time of the accident or that his alleged impairment contributed to his accident or injury. The ALJ's preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[19] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[18] *Ibid*.

[19] K.S.A. 44-534a.

as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[20]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated May 3, 2010, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of July 2010.

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DAVID A. SHUFELT
BOARD MEMBER

c: Mitchell Rice, Attorney for Claimant
Sylvia B. Penner, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[20] K.S.A. 2009 Supp. 44-555c(k).